Supreme Court U.S.
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No. 01-1741

In the

Supreme Court of the United States

DOROTHY A. MARELLO,

Petitioner,

v.

CENTRAL RESERVE LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CENTRAL RESERVE LIFE INSURANCE COMPANY

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COUNTER STATEMENT OF THE QUESTION FOR REVIEW

The U.S. District Court for the Eastern District of Pennsylvania directed Petitioner Dorothy A. Marello to proceed to arbitration to resolve her dispute with Respondent Central Reserve Life Insurance Company regarding a determination of benefits under a medical expense insurance policy. The policy included an express and explicit arbitration agreement. The U.S. Court of Appeals for the Third Circuit affirmed the decision in a Memorandum Opinion, adopting the trial court's reasoning. The only legitimate issue raised by this Petition is:

- WHETHER THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT REVERSIBLY ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF A MOTION TO COMPEL ARBITRATION, WHERE PETITIONER FAILED TO MAKE ANY SHOWING IN THE DISTRICT COURT THAT ARBITRATION WOULD BE PROHIBITIVELY EXPENSIVE?

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COUNTER STATEMENT OF THE CASE

Respondent Central Reserve Life Insurance Company ("Central Reserve") sells medical expense insurance policies to individuals and small groups. Petitioner Dorothy A. Marello ("Marello") applied for an individual preferred provider medical indemnification policy from Central Reserve (the "Policy") on December 1, 1998. Immediately above where Marello signed the application form a conspicuous notice was printed stating that "any disputes arising under the Policy are subject to an appeals procedure, including arbitration, which may be binding, depending on state law." Marello claims that she did not read the application form when she signed it, despite language in the application form attesting that she had read it prior to signing. Marello testified that this language was not hidden from her when she signed; she merely chose not to read the document she signed. Indeed, Marello testified that at no time prior to this litigation had she read the application or the Policy.

In a letter dated December 24, 1998, Central Reserve informed Marello that her application for insurance had been approved with an effective date of December 1, 1998. Shortly thereafter, Marello received a copy of the Policy from Central Reserve. The letter accompanying the Policy instructed Marello to review the Policy and informed her that she could, within 15 days, void all coverage and receive a full refund of the premium paid if she were not satisfied with the insurance. The Policy contained a detailed description of Marello's insurance benefits and the arbitration provisions. The Policy clearly stated that arbitration was required for "[a]ny controversy arising out of or relating to the Policy, [including] disputes about the denial of a claim." Despite Central Reserve's instructions, Marello never examined the Policy to "ascertain the correctness of the schedule of benefits, limitations and exclusions." Instead, she conducted a cursory review of the Policy, and found no Policy provision to be inconsistent with her understanding of the kind of insurance she had intended to purchase.

In April of 1999, approximately four months after the policy became effective, Marello was diagnosed with primary amyloidosis. Marello underwent a regime of chemotherapy, the standard treatment for this disease and a treatment covered by the Policy. Marello was then referred to the Mayo Clinic in Rochester, Minnesota for further tests. In December of 1999, Marello's physicians recommended an alternate course of treatment – an experimental therapy that is not generally accepted by physicians in the United States as treatment for the condition of primary amyloidosis. This treatment consists of high dose chemotherapy with peripheral stem cell rescue. After review of the proposed treatment by an independent physician, Central Reserve concluded that the therapy was excluded under the Policy, based upon a determination that the course of treatment was experimental and not generally accepted within the medical community. Marello's treating physician and Marello herself were notified of the decision in a letter dated December 23, 1999.

Marello utilized the administrative appeal process set forth in the Policy to challenge the decision. Central Reserve had the proposed treatment plan reviewed by an independent, external medical review board. The review board reached the same conclusion as had the independent physician who initially reviewed the treatment. Accordingly, Central Reserve determined that the proposed treatment plan was not covered under the Policy, and Marello was so notified. Marello desired to appeal the matter further, and Central Reserve informed Marello of her right to proceed with arbitration, pursuant to the arbitration agreement in the Policy.

Marello was provided with a copy of Central Reserve's Arbitration Booklet; this publication contained the relevant fee schedule for arbitration of any dispute Marello might have with Central Reserve. With the exception of the filing fee (which Central Reserve ultimately agreed to pay), the fee schedule does not expressly place the burden of any arbitration costs and fees on the insured.

In violation of the clear language of the Policy, Marello never sought to arbitrate her dispute with Central Reserve. Instead, Marello filed a Complaint against Central Reserve in the Lancaster County Court of Common Pleas on June 6, 2000. In her state court action, Marello sought, *inter alia*, an injunction ordering Central Reserve to pay for the proposed treatment, as well as treble damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 Pa. C.S.A. §201-1, et seq.) and punitive damages based on Central Reserve's alleged fraud and bad faith (42 Pa.C.S. §8371). Before any formal proceedings in the state court action, Central Reserve agreed to pay for Marello's treatment on humanitarian grounds.[1]

Although Central Reserve agreed to pay for the treatment, Marello expressed her intention to continue the state court action. Central Reserve then promptly initiated an action in federal court to stay the state court proceedings and compel arbitration. Central Reserve filed its Petition to Compel Arbitration in the United States District Court for the Eastern District of Pennsylvania on June 30, 2000. Since the state court proceedings were not immediately stayed, Central Reserve filed Preliminary Objections in state court on July 5, 2000, to protect its rights and prevent a default judgment from being entered against it. The state court dismissed the Preliminary Objections on September 20, 2000, before the district court granted Central Reserve's Petition to Compel, but well after the parties had submitted briefs to district court on the merits of the Petition. On preliminary objections, the state court held only that it was "unclear from

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[1] Central Reserve did expressly reserve its rights to assert all policy limitations, exclusions and/or provisions in any action brought against it. However, contrary to Marello's assertion, Central Reserve is not seeking and cannot seek repayment of the costs of treatment from Marello. Central Reserve reserved only defensive rights.

With Central Reserve's agreement to pay, Marello received high dose chemotherapy with peripheral stem cell rescue treatment in June of 2000. There has been no suggestion that the effectiveness of the treatment was in any way compromised or diminished as a result of the brief delay between the time it was first recommended and when Marello ultimately received the treatment.

the language of the application that there was a knowing waiver and express agreement to arbitrate by plaintiff." Central Reserve appealed to the Superior Court of Pennsylvania on September 27, 2000.

On October 3, 2000, the district court issued an opinion and order granting Central Reserve's Petition to Compel Arbitration and entering a stay in the state court action. Petitioner filed a Motion to Amend and Correct the district court's order on October 12, 2000. The district court denied that motion by opinion and order dated January 17, 2001.

Marello filed a Notice of Appeal in the United States Court of Appeals for the Third Circuit. On appeal, Marello argued, *inter alia*, that the district court erred in granting the Petition to Compel Arbitration because the filing fees and costs associated with arbitration were so excessive that they deprived Marello of due process of law. In the interim, Central Reserve agreed to pay the initial filing fees for arbitration. Under the applicable fee schedule for the dispute, the filing fees were the only costs that were required to be paid in advance of the arbitration hearing. The other fees and costs associated with arbitration are not billed until the hearing actually takes place, at which point, the arbitrators have the discretion to apportion the costs of arbitration between the parties as justice requires.

On December 20, 2001, the Third Circuit affirmed the district court's grant of Central Reserve's Petition to Compel Arbitration and the denial of Marello's Motion to Amend and Correct the order compelling arbitration "substantially" for the reasons set forth in district court's opinions. Thereafter, Marello filed a Petition for Panel Rehearing and for En Banc Determination. On February 26, 2002, the Third Circuit denied Marello's Petition and the instant Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

Contrary to Marello's assertion that this case provides the Court with an opportunity to answer a question not specifically resolved in *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513 (2000) – how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence – this case presents nothing more than the same factual scenario presented in *Green Tree*. Contrary to Marello's suggestion that this case presents important federal questions that have not been but should be settled by this court, Marello is simply challenging the national policy, as recognized by this Court, favoring arbitration.

In *Green Tree*, this Court reaffirmed its commitment to arbitration as an appropriate, at times desirable, method of resolving disputes. Marello suggests in this Petition that the costs associated with arbitrating her claim effectively precluded her from vindicating her rights through arbitration. However, in the district court, Marello did not establish anything more than the "risk" that she will be required to bear prohibitive arbitration costs. This Court expressly held in *Green Tree* that a showing of "risk" is too speculative. 121 S.Ct. at 522. Furthermore, Marello's argument of prohibitive costs in arbitration is nonsensical when viewed in the context of the extensive litigation activity she has pursued.

Additionally, the instant case does not present any other "compelling reasons" for the exercise of the Court's discretionary certiorari jurisdiction. The lower courts fully considered and correctly decided the issues relating to the enforceability of the arbitration agreement at issue. Marello asks this Court to do what would amount to nothing more than review the lower courts' factual determinations and application of the law. It is well settled that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See* U.S. Sup. Ct. Rule 10. Equally important, the key considerations on certiorari – a

conflict among the circuit courts or an important question of federal law – are absent in this case. Accordingly, the petition for writ of certiorari should be denied.

I. PETITIONER HAS NOT PRESENTED ANY COMPELLING REASON WHICH WOULD WARRANT REVIEW BY THE SUPREME COURT ON THE ISSUE OF PROHIBITIVE COSTS.

In *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 521-22 (2000), this Court upheld the validity of arbitration agreements while also holding that a party seeking to invalidate an arbitration agreement on the ground of prohibitive expense has the burden of showing the likelihood of incurring such arbitration costs. *Id.* at 521-22. As set forth below, Marello has not identified any division or disagreement among the courts of appeals as to what constitutes prohibitive costs or shown that the courts are otherwise having difficulty applying the rule set forth in *Green Tree*. Nor has Marello shown a compelling reason for this Court to reconsider the conclusion reached by both the district court and Third Circuit, based on the factual evidence presented, that Marello did not satisfy her burden of showing a likelihood of actually incurring costs of arbitration which are so excessive that they would preclude her from effectively vindicating her rights.

A. There is No Conflict in the Circuit Courts over the Application of this Court's decision in *Green Tree*.

In *Green Tree*, this Court placed the burden of proving that arbitration would be "prohibitively expensive" on the party seeking to invalidate the arbitration agreement. *Green Tree*, 121 S.Ct. at 522. Admittedly, this Court did not discuss "how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence." Nevertheless, this Court did provide a roadmap of the type of evidence which would be required to

support a finding of prohibitive expense. For instance, the Court expressly noted that the burden cannot be met by a hypothetical showing of what arbitration could possibly cost the plaintiff. *Id.* at 522 n.6. Such "unsupported statements provide no basis on which to ascertain the actual costs and fees to which she would be subject to in arbitration." *Id.* Rather, to meet the burden, the party opposing arbitration must demonstrate that, in her particular case, the expenses would be charged to her and would prevent her from being able to pursue her claims in the arbitral forum. The Court listed examples of relevant evidence being "information about how claimants fare" under the particular arbitration clause, the name of the organization that would conduct the arbitration, the fees that it charges, and who will be charged. *Id.* at 522.

Marello attempts to manufacture a compelling reason for review by this Court in arguing that there is a split among the courts as to what constitutes the proper approach for determining whether a party opposing arbitration has met the burden of proving prohibitive expense. However, careful review of the cases following *Green Tree* reveals that there is no such division.[2]

Guided by this Court's roadmap, the lower courts have shown no difficulty in applying the holding in *Green Tree*. The courts of appeals that have addressed the issue of prohibitive costs, post-*Green Tree*, have rejected a *per se* prohibition against an arbitration provision that might impose prohibitive costs on an individual in favor of a case-by-case approach. *See Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1284-85 (11th Cir. 2001) (court implicitly rejected *per se* approach in favor of case-by-case analysis, but did not determine whether

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[2] Several of the cases cited by Marello as creating a conflict were decided **before** *Green Tree*. Since these cases pre-date *Green Tree*, they neither form the basis for a division in the courts over how to apply *Green Tree*'s burden of proof nor create a compelling reason for granting review in this case.

evidence was sufficient to find arbitration prohibitively expensive because agreement was found to be unenforceable for other reasons). *See also* Kay, Jason Bradley, *The Post-Green Tree Evidentiary Standard for Invalidating Arbitration Clauses in Consumer Lending Contracts: How Much Justice Can You Afford?*, 6 N.C. Banking Inst. 545, 564-65 (2002) (noting commitment on the part of post-*Green Tree* courts to resolving the issue of whether there are prohibitive costs on a case-by-case basis).

In *Bradford*, the Fourth Circuit, relying on this Court's decision in *Green Tree*, explained that although "fee splitting can render an arbitration agreement unenforceable where the arbitration fees . . . are so prohibitive as to effectively deny the [claimant] access to the arbitral forum," a case-by-case analysis should be performed that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation, and whether the cost differential is so substantial as to deter the bringing of claims. 238 F.3d at 555-56. Thus, the "proper inquiry under *Gilmer* [and *Green Tree*] is not where the money goes but rather the amount of money that ultimately will be paid by the claimant," for a claimant cannot be deterred from vindicating statutory rights "simply by the fact that fees would be paid to the arbitrator where the overall cost of the arbitration is otherwise equal to or less than the cost of litigation in court." *Id.* at 556.

Additionally, although sometimes reaching different conclusions regarding the validity of an arbitration provision depending upon the particular facts at hand, the majority of district courts addressing the issue of prohibitive costs post-*Green Tree* have also favored a case-by-case approach. *See, e.g.*, *Klinedinst v. Tiger Drylac, USA, Inc.*, 2001 WL 1561821 at *13 (D.N.H. Nov. 28, 2001) (favoring case-by-case approach used in *Bradford* and other cases pre-dating *Green Tree*); *Manuel v. Honda R&D Americas, Inc.*, 175 F.Supp.2d 987, 994 (S.D. Ohio 2001) (*per se* invalidation of arbitration agreement due to presence of fee-splitting provision contradicts Supreme Court's declaration that party seeking to

avoid arbitration bears burden of proving likelihood of incurring prohibitively expensive costs; *Spinetti v. Service Corp. Int'l*, 2001 WL 1781921 (W.D. Pa. Nov. 15, 2001) (noting that court must look to the particular language pertaining to the payment of fees and costs, if any exists, as well as the actual costs and the claimant's financial situation in assessing enforceability of arbitration clauses); *Phillips v. Associates Home Equity Services, Inc.*, 179 F.Supp.2d 840, 847 (N.D. Ill. 2001) (inquiry must be determined on a case-by-case basis).

Even those district courts which have not specifically adopted the case-by-case approach suggested in *Green Tree* seem to at least implicitly utilize this analysis in reaching their decisions. *See, e.g., Dabney v. Option One Mortgage Corp.*, 2001 WL 410543 at *3-4 (E.D. Pa. April 19, 2001) (discussing different approaches, but ultimately considering plaintiff's financial circumstances and risk of plaintiff having to bear arbitration costs in determining validity of arbitration clause); *Boyd v. The Town of Hayneville, Alabama*, 144 F.Supp.2d 1272, 1279-80 (M.D. Ala. 2001) (same); *Ball v. SFX Broadcasting, Inc.*, 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001) (finding that claimant made showing that she could not afford to pay fees imposed under arbitration provision and likelihood that she would be responsible for these costs).

In *Green Tree*, this Court has offered all the guidance the lower courts need regarding the type of evidence a party opposing arbitration must present to meet its burden of proof. Given the already ample direction provided by this Court, and the absence of any confusion or conflict in the courts of appeals or the district courts over the approach to be used in determining prohibitive expense, further consideration of this issue at this juncture is unnecessary.

B. The District Court's Finding that Marello Failed to Sustain her Burden of Proving that the Costs of Arbitration were "Prohibitively Expensive," and the Third Circuit's Affirmance of that Decision, were Proper.

Failing to demonstrate a conflict among the lower courts on an important federal question, Marello also endeavors to persuade this Court that her individual claims of error have merit. When read in their proper context, Petitioner's arguments amount to little more than a complaint that the lower courts incorrectly found, based on the evidence presented, that Marello had not met her burden of proving prohibitive expense. However, such an allegation of error is alone not sufficient to warrant the "commitment of scarce judicial resources" that a grant of certiorari represents. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). *See also* U.S. Sup. Ct. Rule 10 (certiorari rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law).

In considering Marello's arguments regarding the alleged excessive cost of arbitration and her inability to pay, the role Marello's attorneys and, to some extent, Marello herself, have played in creating the present controversy cannot be over-emphasized. The undisputed facts of record in this case establish that Central Reserve agreed to pay for the treatment which saved Marello's life **over two years ago**. Additionally, Marello has not contended that the brief delay between the treatment recommendation and the actual receipt of treatment compromised or diminished the effectiveness of the treatment. Therefore, as opposed to the typical situation in which a plaintiff pursues claims against an insurance company that has refused to provide coverage, in this case, Marello received the treatment and all the insurance benefits to which she was even arguably entitled.

The only reason a Petition for Writ of Certiorari is sought is to allow Marello and her attorneys to pursue in

court bad faith and consumer protection claims against Central Reserve, presumably to recover attorneys' fees expended in litigating these matters, the vast majority of which were incurred **after** Central Reserve agreed to provide coverage to Marello. Marello's claims will do nothing to obtain or expand insurance benefits, and, in fact, will only serve to provide Marello and her attorneys with a windfall. Furthermore, Marello's attorneys, ignoring the obvious irony of their statements, have maintained throughout this litigation that the high costs associated with arbitration would effectively preclude Marello from vindicating her rights under the law. Despite significant efforts to portray her as a financially strapped, nearly helpless individual, Marello's claimed lack of resources has not impeded her ability to litigate in the trial courts of the state and federal systems, the state and federal appellate courts and now in the highest court in the land. Throughout these federal and state litigations, Marello has vigorously asserted her rights without regard to the cost involved. Asking this Court to grant certiorari on the alleged prohibitive cost of arbitration seems in the view of these litgations something of a non sequitur.

Turning briefly to the merits, even assuming Marello made a proper showing of prohibitive expense, she did not show any likelihood that the alleged costs would actually be imposed upon her. Nor did Marello show that the expenses would have prevented her from vindicating her rights in the arbitral forum. Rather, Marello did little more than build supposition upon supposition. In contrast, Central Reserve presented specific evidence to show that Petitioner would not necessarily incur any expenses associated with arbitration that she would not have also incurred had she litigated the case in court. Central Reserve established that the only cost Marello absolutely would have been required to pay "up front" was the filing fee ($500 - $1,000). Central Reserve agreed to assume the obligation of paying Marello's AAA filing fees. Consequently, the up front cost to Marello of proceeding in the arbitral forum was limited to attorneys' fees and costs, expenses she would have borne whether she arbitrated her claims or proceeded in court. The AAA rules

provided that additional costs, i.e. arbitrator compensation, travel expenses, hearing fees, etc., were to be allocated at the conclusion of the arbitration.[3] If Marello had a genuine financial hardship, she could have presented this hardship argument to the arbitration panel. When hardship is substantiated, AAA liberally grants requests for waiver or deferral of administrative fees. *See Green Tree Financial Corp. v. Alabama*, Brief Amicus Curiae of the American Arbitration Association, 2000 WL 744161 at *16 (June 8, 2000).

At most, Marello demonstrated a "risk" that she might be encumbered with prohibitive arbitration costs. Under *Green Tree*, the mere "risk" of being saddled with prohibitive costs is too speculative to require the invalidation of the arbitration clause in Marello's policy. Therefore, the district court's implicit conclusion that Marello did not meet her burden of proof in this case, and the Third Circuit's affirmance is soundly based and does not warrant review.

II. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S DECISION REGARDING THE LACK OF NEED FOR DISCOVERY AND/OR AN EVIDENTIARY HEARING WAS PROPER.

Marello alternatively urges this Court to grant review to address and resolve the issue of the availability and scope of discovery that should be afforded a party opposing arbitration. Petitioner argues that this Court, in *Green Tree*, clearly implied that discovery would be available to a party

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[3] The AAA rules applicable to this case provide that filing and administrative fees and costs are subject to final apportionment by the arbitrator. Additionally, under Pennsylvania's Unfair Trade Practices and Consumer Protection Law and "bad faith" statutes, a prevailing plaintiff can be awarded attorneys' fees and costs. *See* 42 Pa.C.S.A. §8371; 72 P.S. §201-9.2. Given these provisions for the award of fees and costs, Marello's contention that she might be required to bear substantial costs of the arbitration is too speculative to render the arbitration provision unenforceable. Even if the arbitrator ultimately were to rule in Marello's favor, but then deny her the costs of the action, Marello still could pursue post-arbitration review of the award under the FAA. *See* 9 U.S.C. §§10, 11.

opposing arbitration so he or she could demonstrate whether arbitration would allow that party to effectively vindicate his or her statutory rights. Pet. 20. In considering this argument, it is essential to note a fact conveniently ignored by Marello. At no time did she ever request the opportunity to conduct discovery regarding the cost to arbitrate her claims.

Marello did not request discovery regarding the cost to arbitrate her particular case or the likelihood that she would be responsible for these costs. Rather, Marello's Request for Leave to Conduct Discovery, contained in her Motion to Dismiss Central Reserve's Petition to Compel Arbitration, clearly states that the discovery sought was for the purpose of assisting the district court **in the determination as to whether fraud occurred**. Marello was requesting the following:

a) All knowledge, memoranda, electronic data, documents, and correspondence with, or regarding, the AAA's abandonment of the Insurance Dispute Resolution Procedures, as amended, and administered by the AAA.

b) The average costs for insureds to arbitrate their disputes with CRL for the last five (5) years.

c) The number of insureds allowed to opt out of the arbitration provision for the last five years.

d) The identities and background of the arbitrators in the pool maintained by the AAA for administration of arbitration under its former "Insurance Dispute Resolution" and its commercial procedures.

> e) The identities, qualifications, documents relied upon and opinions of those individuals of the medical panel that participated in the denial [of] Ms. Marello's claim.

In the "Conclusion" of her Motion to Dismiss, Marello defines her need for discovery in terms of "supplementing" and further "verifying" her allegations of fraud.

Green Tree and the other cases cited by Marello make it clear that any discovery by a party seeking to invalidate an arbitration provision must be narrowly limited. *Green Tree*, 121 S.Ct. at 522-23; *Blair v. Scott Specialty Gases*, 283 F.3d 595, 609 (3d Cir. 2002) (finding that discovery should be limited to the narrow issue of the estimated costs of arbitration and the claimant's ability to pay); *Livingston v. Associates Finance, Inc.*, 2001 WL 709465 at *2 (N.D. Ill. June 25, 2001) (limiting discovery to the likely costs that plaintiffs would incur in their particular case and refusing requests for general statistical information as irrelevant).

Marello's own statements belie her claim that she sought, and was denied, discovery aimed at establishing her burden of proof under *Green Tree*. Since Marello was not seeking, and did not ask the district court for, discovery relating to the issue of prohibitive costs, Petitioner has failed to raise a justiciable issue before this Court regarding the right of a party seeking to prove prohibitive expense under *Green Tree* to conduct pre-arbitration discovery.[4]

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[4] With regard to Petitioner's entitlement to discovery on the fraud issue, the District Court in its Opinion and Order dated October 3, 2000 noted that "a party can only avoid an arbitration clause if she specifically alleges that the arbitration clause itself was the product of fraudulent inducement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967). The District Court found that Marello's Complaint never specifically alleged that Central Reserve fraudulently induced her to agree to the arbitration clause. Given its finding that the issue was one for resolution by an arbitrator rather than the Court, the District Court correctly found that allowing discovery in the federal proceedings would be inappropriate.

Marello cites *Blair v Scott Specialty Gases*, *supra*, in support of her claim of entitlement to discovery. A careful reading of the Third Circuit's Opinion in *Blair* reveals that it actually supports Central Reserve's position. In *Blair*, while recognizing the right to "some discovery," the Court expressly stated that the discovery allowed should be limited to the narrow issue of the estimated costs of arbitration and the claimant's ability to pay. *Blair*, 283 F.3d at 609. As set forth in greater detail below, Marello was already in possession of this information when Central Reserve initiated its action in federal court and thus was not entitled to any additional discovery.

In *Livingston v. Associates Finance, Inc.*, 2001 WL 709465 (N.D. Ill. June 25, 2001), another case cited by Marello, the court held that discovery should be "strictly limited to the likely costs that Plaintiffs will incur in this particular case if Plaintiffs are compelled to arbitrate as well as procedures regarding the waiving of fees and costs." *Id.* at *2. The court specifically directed that the discovery requests not include requests for general statistical information, because such information was irrelevant to the costs to be incurred in the specific case. *Id.*

In this case, the discovery requests proposed by Marello are not even arguably the type authorized by *Green Tree* and its progeny. They have no relevance to the cost to arbitrate this dispute or the likelihood that Marello would actually be held responsible for these costs if this case was arbitrated. Additionally, Marello was already in possession of all of the information to which the courts following *Green Tree* have determined a plaintiff is entitled. *See Blair*, *supra*; *Livingston*, *supra*. With regard to her ability to pay, Marello was fully aware of her own financial status and testified to the details thereof at her deposition. A copy of Marello's deposition transcript was submitted to the district court and the Third Circuit. Petitioner also knew the approximate costs of proceeding with arbitration in this case and provided the lower courts with this information. Marello had a copy of Central Reserve's Arbitration Booklet, which contained the

relevant fee schedule for arbitration. Additionally, by letter dated August 8, 2000, AAA provided Marello's attorneys with estimated arbitration costs and the rules that would be used to administer the arbitration.

Since Marello did not request, and was not entitled to, any additional discovery on the issue of costs, the Third Circuit's affirmance of the district court's decision to deny Petitioner's request for leave to conduct discovery was not inconsistent with its decision in *Blair*, nor did it conflict with the decision of this Court in *Green Tree*.

III. THE INSTANT CASE IS AN IMPROPER VEHICLE FOR RESOLVING THE ISSUE OF HOW COURTS SHOULD DEAL WITH AN INVALID ARBITRATION PROVISION IN A CONTRACT IN THE ABSENCE OF A SEVERANCE CLAUSE.

Petitioner alternatively asks this Court to grant certiorari to consider the issue of how courts should deal with an invalid arbitration provision in the absence of a severance clause. Specifically, Marello questions whether courts should "sever or rewrite offending arbitral provisions, strike the provision in its entirety or decide on a case-by-case basis how best to remedy the provision dependent upon the circumstances of the litigant" when a contract lacks a severance clause. Pet. 21. As an initial matter, this issue has not been previously raised, argued or briefed by Marello. Nor has the issue been passed upon in the proceedings before the district court or the Third Circuit. Therefore, this issue should not be considered for the first time by this Court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below"); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 34 (1977) (where asserted basis of liability had not been pleaded, argued nor briefed either in federal district court or in court of appeals, it would not be considered by United States Supreme Court on grant of certiorari).

Furthermore, Central Reserve respectfully submits that this case is not the appropriate vehicle for resolving this issue because it is not ripe for adjudication. Ripeness is peculiarly a question of timing. *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 140 (1974). A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532 (1984)). The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of repetitive litigation. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990).

In this case, before the issue ever arises as to how an invalid arbitration provision should be handled by the courts when there is no severance clause in the agreement, the arbitration clause in the Central Reserve policy must necessarily be declared invalid. To date, there has been no finding by any court that the arbitration provision in the Central Reserve policy is invalid or unenforceable. The district court and the Third Circuit found the provision enforceable and compelled arbitration. Additionally, in ruling on Central Reserve's Preliminary Objections, the state court simply noted that it was "unclear from the language of the application that there was a knowing waiver and express agreement to arbitrate by plaintiff." The state court made no final determination regarding the validity, or lack thereof, of the arbitration clause at issue.

Furthermore, Marello has not identified any true confusion in the lower courts that would justify consideration of the issue by this Court. Central Reserve respectfully submits that determination by this Court of how courts should handle the inclusion of an invalid arbitration provision in a contract where no severance clause exists, in advance of any finding that the arbitration clause at issue is invalid,

involves too remote and abstract an inquiry for the proper exercise of the judicial function.

Admittedly, ripeness requires the Court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Significantly, to withhold court consideration of this issue at this point will not cause the parties any hardship. Marello has already received treatment at Central Reserve's expense and has been relieved of the obligation to pay the costs associated with initiating arbitration. As such, there is no strong or compelling reason to address this issue now. Postponing consideration of the question presented until an actual controversy arises also has the advantage of permitting the lower courts further opportunity to consider the issue and develop an approach that is logical and consistent with existing law. Under the circumstances present, this issue is not ripe for adjudication by this Court.

IV. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S FINDING THAT *ROOKER-FELDMAN* DOES NOT APPLY WHERE THE PETITION TO COMPEL ARBITRATION IS FILED BEFORE THE STATE COURT'S RULING ON THE ISSUE OF ARBITRABILITY WAS IN ACCORDANCE WITH EXISTING LAW.

Marello's final argument for review is that the district court improperly usurped the state court's jurisdiction in this case by entering an order compelling arbitration after the state court denied Central Reserve's Preliminary Objections. In her Petition, Marello presents nothing more than a rehash of what was already extensively briefed, fully considered and correctly decided by the district court and the Third Circuit. Indeed, Marello does not even purport to identify any compelling reason or conflict among the lower courts that would justify consideration by this Court.

Despite Marello's assertion to the contrary, Central Reserve did not "simultaneously litigate" its attempt to compel arbitration in both state and federal courts. Far from it, Central Reserve's decision to file in federal court, and the actual filing of its Petition to Compel Arbitration, were made **before** the state court had issued any ruling in its case. Central Reserve filed its Petition to Compel Arbitration in federal court on June 30, 2000. Only after instituting the federal court action did Central Reserve file Preliminary Objections in the state court action. Even then, the sole reason Central Reserve filed Preliminary Objections was to preserve its rights and protect against a possible finding of waiver. *See Goral v. Fox Ridge, Inc.*, 683 A.2d 931, 934 (Pa. Super. 1996) (finding waiver of right to compel arbitration and rejecting assertion by company that it had raised existence of arbitration clause "promptly at every point" where preliminary objections were not filed: "If Appellants had truly wanted to invoke the arbitration process to preclude litigation, they could have done so by means of preliminary objections"); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 781 (E.D. Pa. 1984) (compelling arbitration when movant not dilatory in seeking arbitration in federal court notwithstanding movant's need to defend against previously-filed state court action).

As in *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126 (2d Cir. 1997), by filing in federal court, Central Reserve was not attempting to appeal from any state court decision. *Id.* at 138; *See also Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 202 (4th Cir. 2000) (distinguishing between the facts before it and a situation in which the party seeking arbitration sought prompt recourse to federal court in order to vindicate its rights under the FAA, with Rooker-Feldman not applying in the latter context). Although the district court's order of October 3, 2000 followed the state court's denial of Central Reserve's Preliminary Objections, Central Reserve's Complaint and Petition to Compel Arbitration preceded it by almost three (3) months. Since there had been no ruling of any type by the state court when the Petition to Compel Arbitration was filed, Central Reserve's act of filing

in federal court cannot be characterized as an appeal. Under these circumstances, the *Rooker-Feldman* doctrine does not operate to bar Central Reserve's selection of federal court as the forum to adjudicate the question of the arbitrability of Marello's claims.

CONCLUSION

Based on the above cited authorities and reasoning, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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